

STATE OF MICHIGAN
COURT OF APPEALS

H&R BLOCK EASTERN ENTERPRISES, INC.,

Plaintiff-Appellant,

v

JEANNE DEGENHARDT and ABACUS TAX
SERVICE, INC.,

Defendants-Appellees.

UNPUBLISHED

May 22, 2007

No. 268001

Grand Traverse Circuit Court

LC No. 05-024360-CZ

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion to dismiss as a sanction for plaintiff's failure to provide discovery as ordered and its violation of the trial court's scheduling order. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff brought an action against defendant Degenhardt, its former employee, alleging that Degenhardt, under the name of defendant Abacus, had prepared tax returns for two of plaintiff's clients in violation of a noncompetition clause in the parties' employment agreement. Plaintiff additionally alleged that Degenhardt had violated the agreement by using confidential client information that she removed from plaintiff's office and by soliciting plaintiff's employees to leave their employment and go to work for defendants.

Following a pretrial scheduling conference, a scheduling order was entered on March 24, 2005. The order established a discovery deadline of August 31, 2005, and provided that "[a]ll discovery requests shall be filed on or before the discovery deadline and all depositions shall be scheduled to occur on or before that date." The order further provided that a final pretrial/settlement conference would take place in November 2005; that at the conference counsel were required to tender to the trial court their trial briefs, marked exhibits, and jury instructions; and that "[f]ailure to comply with every requirement of this conference paragraph may result in a default or a dismissal as may be appropriate against the offending party or attorney and an award of sanctions to each non-offending party" pursuant to MCR 2.401(G). On April 22, 2005, the trial court issued notices scheduling the settlement conference for November 23, 2005, and the jury trial for December 27, 2005.

On August 30, 2005, one day prior to the deadline for making discovery requests, defendants served upon plaintiff interrogatories and a request for production of documents. Plaintiff failed to provide responses to defendants' timely discovery requests as of the September 27, 2005, deadline.¹ Plaintiff additionally failed to respond to defendants' October 6, 2005, correspondence seeking responses, or to defendants' proposed stipulated order that would have given plaintiff until October 17, 2005—three weeks past the deadline imposed by MCR 2.310(C)(2)—to respond.

On November 21, 2005, the trial court granted defendants' motion to compel discovery. Rejecting plaintiff's contentions that the trial court's discovery deadline of August 31, 2005, "made no sense" and that plaintiff's conduct was justified because defendants had failed to execute plaintiff's proposed protective order, the trial court ordered plaintiff to comply with defendants' discovery requests within 10 days of the hearing.

Plaintiff did not provide responses by the December 1 deadline, and it ignored defendants' December 6 correspondence seeking the requested materials. Defendants moved for dismissal pursuant to MCR 2.313(B)(2)(c). At the December 20 hearing on defendants' motion to dismiss, defendants noted that they had not yet received any answers to interrogatories, and that plaintiff's partial responses to the request for production, which had been received only that morning, were extremely incomplete. Plaintiff insisted that it was not required to comply with the discovery deadlines because the parties were involved in ongoing settlement negotiations and because defendants were refusing to execute a protective order. The trial court, in a lengthy ruling from the bench, granted defendants' motion to dismiss. The trial court noted that, in addition to failing to provide key discovery items, plaintiff had failed to submit a trial brief, exhibits, and jury instructions as required by the scheduling order. The court held that, because trial was only days away, prejudice to defendants had resulted from plaintiff's conduct, and that alternative sanctions would not serve the interests of justice.

A trial court's decision to impose sanctions is reviewed for an abuse of discretion. *Borgess Medical Center v Resto*, 273 Mich App 558, 582; ___ NW2d ___ (2007); *Richardson v Ryder Truck Rental, Inc.*, 213 Mich App 447, 450; 540 NW2d 696 (1995). An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006); *Maldonado v Ford Motor Co.*, 476 Mich 372, 388; 719 NW2d 809 (2006).

MCR 2.313(B)(2)(c) expressly authorizes a trial court to enter an order of dismissal or default judgment against a party who fails to obey an order or provide discovery. *Thorne v Bell*, 206 Mich App 625, 632; 522 NW2d 711 (1994). Furthermore, MCR 2.504(B)(1) provides for dismissal of an action if a plaintiff fails to comply with the court rules or a court order, such as the scheduling order in this case. However, the trial court should carefully examine the circumstances before imposing the drastic sanction of dismissal. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000). Dismissal is generally appropriate only when a party's failure to comply with discovery rules or orders is flagrant, wanton, or willful, not when the failure to comply is accidental or involuntary. *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999); *Edge v Ramos*, 160 Mich App 231, 234; 407 NW2d 625 (1987). For a

¹ See MCR 2.310(C)(2); MCR 2.309(B)(4).

violation to be willful it need only be conscious or intentional; there need not be wrongful intent. *Id.*

The factors that should be considered in determining an appropriate sanction include:

“(1) [W]hether the violation was wilful or accidental; (2) the party’s history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the [other party]; (4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such actual notice; (5) whether there exists a history of [the party’s] engaging in deliberate delay; (6) the degree of compliance by the [party] with other provisions of the court’s order; (7) an attempt by the [party] to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice.” [*Bass, supra* at 26-27, quoting *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990) (alterations in original).]

The record reflects that the trial court gave careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it. *Bass, supra* at 26-27.

We conclude that the trial court did not abuse its discretion in imposing dismissal as a sanction for plaintiff’s repeated and intentional violations of the court rules and the trial court’s orders.

Plaintiff’s own proffered justifications for its dilatory conduct indicate that it purposely withheld the requested materials because it believed settlement negotiations were underway and because of defendants’ refusal to execute a proposed protective order. Moreover, it was not until December 20, 2005, three months after responses were due—and within mere days of the scheduled trial—that plaintiff provided even *partial* responses to defendants’ request for production. The record indicates that these partial responses were incomplete and unsatisfactory. No response at all was provided to defendants’ interrogatories as of the time of the hearing. Furthermore, even though defendants’ trial materials had been filed almost a month earlier, plaintiff had not yet *completed*, let alone filed, the trial brief, exhibits, and jury instructions that the March 24, 2005, scheduling order required to be tendered at the November settlement conference. Plaintiff continued to assert, without offering any authority for its position, that it did not have to comply with defendants’ discovery requests or the scheduling order because the parties had been negotiating for the entry of a protective order. On appeal, plaintiff suggests that the trial court was biased against it, as reflected by the scheduling of the settlement conference and trial dates in close proximity to the Thanksgiving and Christmas holidays, notwithstanding that the orders establishing these dates were entered on April 22, 2005, without objection from plaintiff, and that any difficulty presented by this schedule obviously affected both parties equally.

Contrary to plaintiff’s argument, the record reflects that the trial court gave careful consideration to all of the aforementioned circumstances and the relevant *Bass* factors before dismissing the case. As the trial court indicated, this was a matter of plaintiff’s lengthy history of deliberately failing to provide *any* responses whatsoever, rather than simply providing

incomplete or insufficient responses. The trial court further commented that plaintiff's contention that its conduct was justified because of ongoing discussions concerning a protective order was wholly unsupported by authority, and, moreover, plaintiff had not made any formal discovery request or motion for protective order. Noting that trial was days away and that defendants had not yet received a trial brief or basic discovery materials from plaintiff, the trial court found that prejudice to defendants had resulted and that the possibility of "ambush" existed. The trial court noted that although plaintiff was apparently attempting to provide partial responses to defendants' request for production, key elements of the responses were missing, and no response had yet been received to defendants' interrogatories. Finally, the trial court specifically addressed plaintiff's suggestion that a lesser sanction would be appropriate; the court held that monetary sanctions would not remedy the prejudice to defendants in having to prepare for a trial that was days away, and that an adjournment would merely *reward* plaintiff's dilatory tactics (as well as wreak havoc on the trial court's busy and well-planned docket).

Because the trial court gave careful consideration to the circumstances and requisite factors before concluding that dismissal of the case was appropriate, and because dismissal was wholly justified in the face of plaintiff's repeated, willful failures to comply with the discovery rules and the court's orders, the trial court did not abuse its discretion in dismissing plaintiff's action against defendants with prejudice.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff